RE MOHD ZUHRI MOHD IDRIS; EX P BUMIPUTRA-COMMERCE BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[BANKRUPTCY NO: D5-29-2350-2005]
25 JUNE 2009

PLEADINGS: *Amendment - Application for - Amendment of name on bankruptcy papers - Mere averment of clerical errors - Whether amendment should be refused - Bankruptcy Act 1967, s. 93*

On 27 December 2006, one Mohd Zuhri Mohd Idris ('Mohd') was adjudged a bankrupt. The bankruptcy proceedings were occasioned by reason of the non-settlement of debt procured by order of court dated 10 August 2000 against a defendant known as Ahmad Zuhri Mohd Idris ('Ahmad'). Ahmad was personally served with the relevant bankruptcy papers at his address but Ahmad did not attend court on the mentioned date as he took the position that it was not his name and not his address on the cause papers. However, the creditor's petition was granted and the court made adjudication and receiving orders. Ahmad came to learn of his status as a bankrupt sometime in 2007 and instructed his lawyers to file an application to set aside the adjudication and receiving orders and to strike out the related creditor's petition. The application was refused and an appeal to the court of appeal was currently pending. Separately, by *ex parte* summons in chambers filed on 22 May 2007, the judgment creditor filed an application to amend Mohd's name to Ahmad's name. That application was withdrawn with costs on 26 February 2008. Three days later, an *inter partes* application for a similar purpose was filed. On 21 November 2008, the amendments were allowed. Ahmad now appealed against that decision.

Held (allowing the appeal):

(1) Section 93 gives the court the power to 'amend any written process or proceedings upon such terms, if any, as the court seems fit' at any time. However, in entertaining an application under s. 93 of the Bankruptcy Act 1967, the court may impose terms as it seems fit. It was expedient and necessary to ask whether the mistake or defect in the name of the

A debtor was a correctible clerical error or a fatal mistake. In the affidavit filed in support of the application to amend, the only reason offered was inadvertent regrettable clerical error. (paras 9, 11 & 13)

B **(2)** It was without doubt that the name Mohd was erroneous. The intention was to make Ahmad bankrupt. But, even in bankruptcy proceedings, there were processes and procedures that require strict observance. Amongst the matters that must be correct from the word go was the identity of the debtor C and the debt. These were vital particulars as it was the failure by the identified debtor to pay the debt that likened it to an act of bankruptcy. In the identification of the debtor, there was a difference between getting a name right and getting the spelling of a name right. In this instance, it was the earlier. D For this reason alone, the amendment must be refused. (para 14)

(3) Even if it may be argued that this was an amendment within the intent of s. 93, reasons must be forthcoming. There was E none here other than a mere averment of clerical error and the belief of no prejudice to Ahmad. Obviously, there was prejudice as Ahmad had had no opportunity to respond to the petition. It was reasonable for him to take the position that he need not respond to the petition though personally served F since he was not the named person in the petition. The burden was first on the creditor to ensure that the relevant cause of papers were in order. The duty and responsibility of care as provided under the Bankruptcy Rules lay with the creditor. Furthermore, the creditor had not offered any G explanation for the delay in making this application. To allow an amendment in the circumstances would certainly not be doing complete justice to all parties concerned. (para 15)

Legislation referred to:
Bankruptcy Act 1967, ss. 8, 9, 91, 93
H Bankruptcy Rules 1969, rr. 94(1)(aa), 274, 276
Rules of the High Court 1980, O. 14

For the judgment debtor - Tejindarpal Kaur; M/s Tejindarpal & Co
For the judgment creditor - Noraiha Norasid; M/s Ram Reza & Muhammad

I *Reported by Suhainah Wahiduddin*

JUDGMENT

Mary Lim JC:

[1] This is a classic example of what can go drastically wrong when one is not thorough in the handling of cause papers. This is especially so in this age of technology with the availability of editing tools that simplifies and speeds up clerical work relating to cause papers. In matters concerning bankruptcy, special care must be taken to ensure that the stringent requirements of the law are complied with. This extends to getting details precisely correct. A simple clerical error may end up being fatal.

Facts

[2] On 27 December 2006, one Mohd Zuhri bin Mohd Idris bearing identification Card number (660407-10-6207/A0421453) and residing at 62, Jalan Keramat Hujang, 54000 Kuala Lumpur was adjudged a bankrupt. The bankruptcy proceedings were occasioned by reason of the non-settlement of a debt procured by order of court dated 10 August 2000 against a defendant known as Ahmad Zuhri bin Mohd Idris. For convenience he shall be referred to as "Ahmad" while the other name appearing in the bankruptcy papers shall be referred to as "Mohd".

[3] Now, Ahmad was actually personally served with the relevant bankruptcy papers at his address at 16, Pesiaran Keramat Hujang, 54000 Kuala Lumpur. Those papers being the bankruptcy notice and the creditor's petition. But, Ahmad did not attend court on 27 December 2006. From his affidavit, it appears he took the position he need not attend since it was not his name and not his address on the cause papers.

[4] Unfortunately for Ahmad, the creditor's petition was granted and the court made adjudication and receiving orders. The effect of a receiving order is undeniably extensive as can be seen from ss. 8 and 9 of the Bankruptcy Act 1967 (Act 360). Since Ahmad's identification card number is the same as Mohd's, he then came to learn of his status as a bankrupt some time in April 2007. A file search conducted on 17 May 2007 confirmed his worse fears. He was somehow linked to the bankruptcy proceedings. He then instructed his lawyers to file an application to set aside the adjudication and receiving orders and to strike out the related creditor's petition. This was duly done on 21 May

2007. The application was refused on 14 December 2007 and the subsequent appeal was also dismissed on 22 February 2008. An appeal to the Court of Appeal is currently pending.

[5] Separately, by *ex parte* summons-in-chambers filed on 22 May 2007, the judgment creditor filed an application to amend Mohd's name to Ahmad's name as appearing in the bankruptcy notice dated 8 June 2005, creditor's petition dated 23 December 2005 and the adjudication and receiving orders dated 27 December 2006. That application was withdrawn with costs on 26 February 2008. Three days later, an *inter partes* application for a similar purpose was filed. On 21 November 2008, the amendments were allowed. Ahmad now appeals against that decision.

Submissions

[6] Several grounds were canvassed in support of the appeal. Amongst these grounds is the matter of the court being *functus officio* to amend the cause papers identified. It was the submission of learned counsel for Ahmad that once the adjudication and receiving orders were granted and sealed copies of the same had been extracted, the court was deprived of jurisdiction to make further orders, in particular the jurisdiction and the power to amend any earlier order made.

[7] Learned counsel for Mohd submitted that the cause papers though served on Ahmad, were served personally. Ahmad knew the person intended was him and not Mohd since the judgment was procured in contested O. 14 proceedings. The debt was also still due and owing.

Findings

[8] In this respect, regard must be given to the provisions of the Bankruptcy Act 1967 (Act 360) and the Bankruptcy Rules 1969. Part V of Act 360, in particular s. 91 provides the High Court with "full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case". The High Court necessarily has these extensive powers bearing in mind the ultimate object of the orders that may be made. In essence the persons adjudged bankrupt have their capacities to transact and manage their financial affairs removed till their debts are settled.

[9] While r. 276 Bankruptcy Rules provide for the application of the Rules of the High Court *mutatis mutandis* where there is no rule regulating any proceeding under the Act or Rules, there is actually no need for such recourse in the instant case. There is s. 93 which gives the court the power to "amend any written process or proceedings upon such terms, if any, as the court seems fit" at any time. In my view, the High Court exercising jurisdiction in bankruptcy matters is cloaked with special jurisdiction and powers under the Bankruptcy Act as can be seen from the language in s. 91.

[10] In bankruptcy proceedings, the making of adjudication and receiving orders do not end or complete the proceedings. Other than the bankruptcy notice and the petition for bankruptcy which are issued earlier to initiate the proceedings, it is just the beginning. The insolvency office has to administer the property of the bankrupt, hold meetings and settle the bankrupt's debts according to law. This obviously takes time and involves a myriad of processes often stretching over long periods of time. In the course of dealing with these matters, frequently parties, including the bankrupt will have to come back to court for orders, directions or some times, variation of orders made earlier. Hence, the need for provisions such as ss. 91 and 93. Section 91 plainly empowers the court to determine "all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy". An application to amend in the manner sought comes within the ambit of these provisions. In my view, s. 93 is also not restricted to "process or proceedings" ongoing at the material time. Read together with s. 91, s. 93 may be invoked after the conclusion of the process or proceeding and to amend cause papers relating to the process or proceeding. This argument on *functus officio* is therefore without merit.

[11] However, in entertaining an application under s. 93, the court may impose terms as it seems fit. More significantly is the exhortation in s. 91 where the court is to look at issues of expediency or necessity for the purpose of doing complete justice. To this end, it is expedient and necessary to ask whether the mistake or defect in the name of the debtor is a correctible clerical error or, a fatal mistake.

[12] Rule 94 (1)(aa) Bankruptcy Rules require every Bankruptcy Notice to be, *inter alia* endorsed with "the name and National Registration Identity Card number of the debtor". Since the effect of bankruptcy is semi-penal in nature, there must be strict compliance of the requirements under the Bankruptcy Act and Bankruptcy Rules. In this case, one of those two requirements is correct, the identification card number. But this is insufficient. Of the two requirements, I regard the name to be paramount as this identifies the debtor. After all, in the judgment which forms the basis for the debt, no identification card details are stated. A person's name identifies his honour and integrity including financial integrity. The identification card number is intended to avoid doubt, since more than one person may bear the same name. Nevertheless, statute requires both details failing which the relevant documents are not properly before the court, until and unless amended.

[13] In determining whether the application to amend may be allowed the reasons for the error must be examined. In the affidavit filed in support of the application to amend, the only reason offered is inadvertent regrettable clerical error. The creditor claimed no prejudice would be occasioned by the amendment. Further, r. 274 of the Bankruptcy Rules was relied on:

> Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

[14] It is without doubt that the name Mohd is erroneous. The intention is to make Ahmad bankrupt. But, even in bankruptcy proceedings there are processes and procedures that require strict observance. Amongst the matters that must be correct from the word go is the identity of the debtor and the debt. These are vital particulars as it is the failure by the identified debtor to pay the debt that likens it to an act of bankruptcy. In the identification of the debtor, there is a difference between getting a name right and getting the spelling of a name right. In this instance, it is the earlier. For this reason alone, the amendment must be refused.

[15] Even if it may be argued that this is an amendment within the intent of s. 93, reasons must be forthcoming. There is none here other than a mere averment of clerical error and the belief of no prejudice to Ahmad. Obviously, there is prejudice as Ahmad has had no opportunity to respond to the petition. Whether he would have succeeded or otherwise is immaterial. The effect of being a bankrupt is also in itself prejudice. I am of the view that it was reasonable for him to take the position that he need not respond to the petition though personally served since he was not the named person in the petition. The burden is first on the creditor to ensure that the relevant cause papers are in order. Although the attached judgment to the Bankruptcy Notice refers to Ahmad, the second defendant in that action, it may also be said to refer to the third defendant whose name reads as "Mohd Idris bin Hj Ibrahim". The confusion is caused by the creditor and it is not the responsibility of Ahmad to point out the error in the creditor's action. The duty and responsibility of care as provided under the Bankruptcy Rules lies with the creditor.

[16] Furthermore, the creditor has not offered any explanation for the delay in making this application. To allow an amendment in the circumstances will certainly not be doing complete justice to all parties concerned. Accordingly, the appeal is allowed with costs.